

(21,856.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM
S. McCLELLAN, ET AL., PETITIONERS,

vs.

JOHN E. CARLAND, U. S. DISTRICT JUDGE FOR THE
DISTRICT OF SOUTH DAKOTA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1908, of said Court, before the Honorable Willis Van Devanter, and the Honorable Elmer B. Adams, Circuit Judges.

Attest:

[United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: the following proceedings, among others, were had in said United States Circuit Court of Appeals for the Eighth Circuit, and appear of record in said Court, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

THURSDAY, April 22, 1909.

No. 99, Orig.

JOHN C. McCLELLAN et al., Petitioners,
vs.

JOHN E. CARLAND, United States District Judge for the District of South Dakota.

On Petition for Writ of Mandamus.

2 Upon consideration of the petition (or information) for a writ of mandamus, it is now here ordered by the Court, that leave be, and the same is hereby, granted to file and docket the same.

APRIL 22, 1909.

The petition referred to in the above order is in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, WALTER McCLELLAN, and EDMUND McCLELLAN, Petitioners,
vs.

JOHN E. CARLAND, United States District Judge for the District of South Dakota.

Petition for Writ of Mandamus.

To the Honorable Circuit Judges of the United States Holding said Court:

The above named petitioners respectfully state that on the 8th day of September, 1908, a suit was begun by them against George T.

Blackman, special administrator of the estate of John McClellan, deceased, in the Circuit Court of the United States for the District of South Dakota, Southern Division, by the filing of their Bill of Complaint in said Court, a true copy whereof is hereto annexed and marked Exhibit "A" and made a part hereof.

That on the 25th day of September, 1908, the said George T. Blackman, defendant, made and filed his Answer to the said Bill of Complaint, a true copy of which answer is hereto annexed and marked Exhibit "D" and made a part hereof.

That on the 28th day of October, 1908, these petitioners duly made and filed their replication to said answer, a true copy whereof is hereto annexed, marked Exhibit "C" and made a part hereof.

3 That on the 24th day of November, 1908, the State of South Dakota made application to the said Circuit Court for leave to file a petition for intervention and obtained from said Court an order requiring these petitioners and the defendant, George T. Blackman, to show cause before said Court why leave should not be granted to the State of South Dakota to intervene as a party in said action or suit which had been begun as aforesaid by these petitioners; that a copy of said order to show cause is hereto annexed and marked Exhibit "D" and made a part hereof.

That a return to said order to show cause was duly filed on behalf of these petitioners and the matter of the said order to show cause coming on for hearing before said Court on the 21st day of December, 1908, and the Court having heard arguments for and against the granting of said petition, and having taken the said matter under advisement, on the 4th day of January, 1909, made and entered an order over-ruling the motion of the said State of South Dakota for leave to intervene, which order over-ruling said motion is hereto annexed, marked Exhibit "E" and made a part hereof.

That upon the 18th day of March, 1909, the said Circuit Court in pursuance of the order heretofore set out and marked Exhibit "E" and upon a showing made by the affidavit of the State's Attorney within and for the County of Minnehaha and State of South Dakota, made a further order staying proceedings of the said suit brought in said Court by these petitioners, which further order is hereto annexed, marked Exhibit "F" and made a part hereof.

That thereafter and on the 29th day of March, 1909, these petitioners through their attorneys made application to the said Circuit Court for an order requiring the State of South Dakota and the Attorney General thereof, and the County of Minnehaha and State's Attorney thereof, to show cause before the said Court why the said orders so made, towit: the order Exhibit "E" and the order
4 Exhibit "F" should not be vacated and set aside and why the suit of these petitioners should not proceed immediately to a speedy hearing and determination of the same, which order to show cause was granted by the said Court, a true copy whereof is hereto annexed, marked Exhibit "G" and made a part hereof.

That the State of South Dakota, through the Attorney General thereof, and the County of Minnehaha, through the State's Attorney thereof, made a return to the said order on them to show cause, and

the matter coming on for hearing before the said Circuit Court on the 14th day of April, 1909, and having been duly considered, the Court entered an order over-ruling the application contained in the said order to show cause, which order so over-ruling the said application is hereto annexed and marked Exhibit "H" and made a part hereof.

Your petitioners further allege that the said orders staying proceedings, Exhibit "E" and Exhibit "F," have never been vacated or set aside; that the said order, Exhibit "H," refusing to vacate and set aside the said order staying proceedings has never been vacated or set aside. That said orders were made by the said Circuit Court arbitrarily and unlawfully, and in violation of the right which your petitioners have under the constitution and laws of the United States, to have their said action in the Circuit Court tried by the said Court in the ordinary course of procedure, and that your petitioners have no remedy by appeal or writ of error to review the said orders.

Wherefore: your petitioners pray that this Court issue to the Honorable John E. Carland, District Judge of the United States for the District of South Dakota and holding the Circuit Court in said District, a writ of mandamus, commanding him to vacate and set aside said orders staying proceedings in said action and to proceed to try and determine said action in the usual course of procedure, without regard to the pendency of the proceeding, hereinbefore alleged, now pending in the Courts of the State of South Dakota.

GRIGSBY & GRIGSBY,

Attorneys for Petitioner, Sioux Falls, South Dakota.

STATE OF SOUTH DAKOTA,

County of Minnehaha, ss:

I, Melvin Grigsby, one of the attorneys for the petitioners mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief. Those statements made on my own knowledge I know to be true and those statements made upon information and belief I verily believe to be true, and I have read said petition.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 20th day of April, 1909.

[SEAL.]

SIoux K. GRIGSBY,
Notary Public, South Dakota.

EXHIBIT "A."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. MCCLELLAN, Walter McClellan, and Edmund McClellan, Complainants,

VS.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States for the District of South Dakota, in Chancery Sitting:

John C. McClellan, a citizen and resident of Ellis County, in the State of Texas, James S. McClellan, a citizen and resident of Pulaski County, in the State of Arkansas, William S. McClellan, a citizen and resident of Teller County, in the State of Colorado, and Walter McClellan and Edmund McClelland, both of whom are citizens and residents of Allegheny County, in the State of Pennsylvania, bring this their bill of complaint against George T. Blackman, a citizen and resident of the State of South Dakota, as special administrator of the estate of John McClellan, deceased, and thereupon your orators, and each of them complain, allege and show to the Court:

First.

That John McClellan, whose true name was John McClelland, was a citizen and resident of the County of Minnehaha and State of South Dakota, died, intestate, on or about the 31st day of August, 1899, in the City of Sioux Falls, County of Minnehaha and State of South Dakota, and that said deceased left an estate in the aforesaid county and state consisting of real and personal property of the value at the time of his death, aforesaid, so far as is known to these complainants of about the sum of Thirty-three Thousand Dollars (\$33,000.00).

Second.

That thereafter and on or about the 8th day of February, 1900, the County Court in and for said County of Minnehaha and State of South Dakota, after due and regular proceedings therein, made, filed and entered its order and issued letters of administration to one William Van Eps of said County and State, as administrator of the said estate of said John McClellan, deceased. That said William Van Eps duly qualified as such administrator and did take possession of the said estate and held possession thereof until on or about the 12th day of July, 1906, when the said William Van Eps departed this life.

Third.

That thereafter such proceedings were had in the said County Court in the matter of the said estate, that on or about the 17th day of September, 1906, the said Court made, filed and entered its order and issued letters of special administration to George T. Blackman, defendant above named, as special administrator of the said estate. That the said George T. Blackman did then and there qualify as such special administrator and did then and there take possession of the said estate and ever since has been and is now the duly appointed, qualified and acting special administrator of the said estate of John McClellan, deceased.

Fourth.

Your orators further allege and show that the value of the said estate of said John McClellan, deceased, situated and located within the State of South Dakota, and now in the possession and control of said George T. Blackman, as special administrator thereof, was on the first day of June, 1907, in excess of the sum of Thirty-five Thousand Dollars (\$35,000.00); that the said estate at that time consisted of real estate situated in the City of Sioux Falls, County of Minnehaha and State of South Dakota, and farm lands in the County of Davison, State of South Dakota, cash in the hands of the said George T. Blackman, bank stock and certain miscellaneous notes and other personal property.

That since the said first day of June, 1907, the said George T. Blackman, as administrator, has rented, and collected, the rents from certain of the real estate and farming lands belonging to said estate and has deposited certain of the said cash in hand so as to obtain interest thereon for the benefit of said estate.

Fifth.

Your orators further allege and show that there are no outstanding claims against the said estate and that all the creditors of the said John McClellan, deceased, have been paid and that the said estate is now ready for distribution thereof according to the Statutes of the State of South Dakota in such cases made and provided.

Sixth.

Your orators further allege and show that the value of the said estate of said John McClellan, deceased, situated and located within the state of South Dakota, and now in the possession and control of said George T. Blackman, as special administrator thereof, is in excess of the sum of Thirty-five Thousand Dollars (\$35,000.00) and that there are no outstanding claims against the said estate and that all the creditors of the said John McClellan, deceased, have been paid and that the said estate is now ready for distribution thereof according to the Statutes of the State of South Dakota in such cases made and provided.

Seventh.

Your orators further allege and show that the said John McClellan, deceased, was born in the Parish of Skryne in the County of Meath, Ireland, on or about the year A. D. Eighteen Hundred and Twenty-one (1821) and that thereafter and on or about the 26th day of February A. D. 1846, the said John McClellan, deceased, was duly and legally married to one Hannah Cruikshank in the Parish Church in said Parish of Skryne, County of Meath, Ireland.

Eighth.

That three sons were born of said marriage of which are the complainants, John C. McClellan, James S. McClellan and a third son, William S. McClellan; that the said William S. McClellan departed this life on or about the year A. D. 1888, leaving three sons, who are your complainants William S. McClellan, Walter McClellan and Edmund McClellan.

Ninth.

Your orators further allege and show that the complainants John C. McClellan and James S. McClellan are sons and the complainants William S. McClellan, Walter McClellan and Edmund McClellan are the grandsons of the said John McClelland, deceased, and that your orators are the sole surviving heirs at law and next of kin of the said deceased and are lawfully entitled to inherit the
9 estate of the said deceased under and by virtue of the laws and statutes of the said State of South Dakota.

In consideration whereof, and inasmuch as your orators have no sufficient remedy at law and are only relievable in a court of equity where matters of this character are cognizable and reviewable, to the end, therefore, that your orators may obtain the relief to which they are justly entitled in the premises, and which they can only obtain in a court of equity, your orators pray the court to grant them due process by subpœna directed to said George T. Blackman, as special administrator of the estate of John McClellan, deceased, commanding and requiring him to appear herein and answer, but not under oath, the same being expressly waived, the several allegations in this your orator's bill contained.

And your orators further pray that upon a final hearing it be ordered and decreed that your complainants John C. McClellan and James S. McClellan are sons and your complainants William S. McClellan, Walter McClellan and Edmund McClellan are grandsons of said John McClellan, deceased, and that your orators are the sole surviving heirs at law and next of kin of said deceased and entitled to inherit the said estate; and that the title in fee to all of the said real estate is in them, the said complainants, and that it be further ordered and decreed that the said George T. Blackman, special administrator and defendant herein, render a just and true account of all the moneys and credits, bank stock, rents and interest collected and other personal property now in his hands belonging to the said estate and that, after deducting his lawful fees and ex-

penses lawfully incurred as such administrator, he distribute all of the personal property in his hands, as such special administrator, according to the laws of the State of South Dakota in such cases made and provided, towit: To complainants John C. McClellan and James S. McClellan one-third to each thereof, and to complainants William S. McClellan, Walter McClellan and Edmund McClellan to each, one-ninth thereof, and failing so to do that these complainants may have judgment against him, the said George T. Blackman, as special administrator, for the total value of all of the said personal property found to be in his hands and under his control.

10 That pending a determination of this suit the said George T. Blackman, as special administrator aforesaid, be directed and acquired to hold intact the said estate, and both real and personal property thereof, and that he may be enjoined pendente lite from disposing or attempting to dispose of, or from distributing, and from assigning or turning over to any person or persons whatsoever, the said estate or any part thereof until further order of this Court in the premises; and that the Court grant such other and different relief herein as may be equitable and just.

And your orators as in duty bound will ever pray;

JOHN C. McCLELLAN,
JAMES S. McCLELLAN,
WILLIAM S. McCLELLAN,
WALTER McCLELLAN,
EDMUND McCLELLAN,

By GRIGSBY & GRIGSBY,
Solicitors and of Counsel for Complainants,
Sioux Falls, S. Dak.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Personally appeared Melvin Grigsby, who being first duly sworn, deposes and says: That he is a member of the firm of Grigsby & Grigsby, solicitors and of counsel for the complainants above named; that he has read the foregoing replication to answer and bill of complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the reason that this verification is not made by the said complainants or either of them is that none of the said complainants are residents of or now within the County of Minnehaha and State of South Dakota, wherein deponent resides.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 8th day of September, A. D., 1908.

[SEAL.]

A. B. MULLER,
Notary Public South Dakota.

11

EXHIBIT "B."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

VS.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Answer.

Comes now the defendant in the above entitled action and for answer to the bill of complaint therein:

I.

Admits the first, second, third and fourth paragraphs thereof.

II.

As to every other allegation, statement and charge in said complaint contained defendant has no knowledge or information sufficient to form a belief and therefore denies the same.

III.

Defendant represents to this honorable court that he now holds and, until the order or judgment of this court to the contrary, will continue to hold, the property described in said bill of complaint to be desposed of agreeable to the judgment or order of this court, and disclaims any interest in and to said property or any part thereof save only in his official capacity as Special Administrator of the Estate of John McClellan, deceased.

GEORGE T. BLACKMAN, *Defendant.*

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EXHIBIT "C."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Replication to Answer.

Replication of Complainants in the Above Cause to the Answer of George T. Blackman, Special Administrator of the Estate of John McClellan, Deceased.

These repliants, saving and reserving all advantage of exception to the manifold insufficiencies of said answer, for replication thereto sayeth that they will aver and prove their said bill to be true and sufficient, and that the said answer is untrue and insufficient; wherefore repliants further pray relief as in said bill set forth.

JOHN C. McCLELLAN,
JAMES S. McCLELLAN,
WILLIAM S. McCLELLAN,
WALTER McCLELLAN,
EDMUND McCLELLAN,

By GRIGSBY & GRIGSBY,
Solicitors and of Counsel for Complainants,
Sioux Falls, S. Dak.

Filed October 28th, 1908. (November Rules.)

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

13 Personally appeared Melvin Grigsby, who being first duly sworn, deposes and says: that he is a member of the firm of Grigsby & Grigsby, solicitors and of counsel for the complainants above named; that he has read the foregoing replication to answer and knows the contents thereof and that the same is true to be the best of his knowledge, information and belief; that the reason that this verification is not made by the said complainants or either of them, is that none of the said complainants are residents of or now within the County of Minnehaha and State of South Dakota, wherein deponent resides.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 28th day of October,
A. D. 1908.

[SEAL.]

E. E. RODABAUGH,
Notary Public, South Dakota.

EXHIBIT "D."

In the Circuit Court of the United States for the District of South
Dakota, Southern Division.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

VS.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant; The State of South Dakota, Intervenor.

Order on Petition for Intervention.

The petition of the state of South Dakota for leave to intervene herein, duly verified by S. W. Clark, Attorney General of the State of South Dakota and by Alpha F. Orr, State's Attorney within and for the County of Minnehaha, in said State of South Dakota, having been presented to the court by U. S. G. Cherry as Special
14 Counsel for the said State of South Dakota and for the said Attorney General and said State's Attorney and the same having been fully considered it is:

Ordered that leave be and the same is hereby granted to file the said petition herein; that the 21st day of December, at the hour of ten o'clock A. M. of that day is hereby fixed as the time and the court room of the said court in the Federal Building at the city of Sioux Falls in the said state, is fixed as the place for hearing upon the said petition; that a copy of the said petition and this order be served upon the said complainants or their said counsel Grigsby & Grigsby and upon the said defendant, or his said counsel, Aikens & Judge, at least 15 days before the date herein fixed for hearing, as aforesaid and that the said complainants and the said defendant show cause, if any they have, before this court at the said time and place herein fixed for such hearing or as soon thereafter as counsel can be heard, why leave should not be granted to the said State of South Dakota to intervene as a party to this action and why the said complainants herein should not answer the said petition within such time as may be fixed by the order of the court upon such hearing and that in case of the failure of the said complainants so to do, then that the said petition be taken as confessed by the said complainants and that a decree be entered herein accordingly and that the said complainants, at said time and place, further show cause, if any they have, why leave should not be granted to the said State of South Dakota to plead, demur, or reply to the said answer of the

said complainants herein, if such answer shall be made and to take and have such other proceedings herein as may be granted, ordered and allowed and as may be just and equitable.

Done at the city of Sioux Falls, in the said District of South Dakota this 24th day of November, 1908.

By the Court,

JOHN E. CARLAND, *Judge*.

Attest:

O. S. PENDAR, *Clerk*.

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EXHIBIT "E."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant; The State of South Dakota, Intervenor.

The above entitled cause coming on for hearing before the Court, pursuant to the petition filed herein by leave of the court, by the state of South Dakota, for leave to intervene herein and upon the Order to Show Cause based upon the said petition returnable herein on the 21st day of December, 1908; S. W. Clark, Attorney General within and for the state of South Dakota, Alpha F. Orr, State's Attorney within and for the county of Minnehaha, and U. S. G. Cherry, as Special Counsel for the said state of South Dakota, all appearing in behalf of the said state of South Dakota, and Grigsby & Grigsby solicitors for the complainants, appearing in opposition to the said petition and order to show cause, and the Court having heard the arguments of counsel and being fully advised in the premises; Now, on all the proceedings hereinbefore had it is

Ordered, That the motion of the said state of South Dakota for leave to intervene herein be and the same is overruled and denied and it is

Further ordered that the further prosecution of this action be and the same is hereby stayed for a period of ninety days from and after December 24th, 1908, for the purpose of allowing the state of South

16 Dakota to commence a proper action or proceeding in the proper court to establish its alleged title and interest in and to the said property and estate of the said decedent and that in the event that such action is commenced within this time, then that this action and the prosecution thereof be further stayed until the determination of such action brought by the state of South Dakota and that in case no such action is commenced by the state of South

Dakota within the time herein specified, then that this action shall proceed as equity and justice may require.

Done at Sioux Falls, South Dakota this 4th day of January, 1909.
By the Court:

JOHN C. CARLAND, *Judge.*

Attest:

[Seal of Court.]

OLIVER S. PENDAR, *Clerk,*
By ODIN R. DAVIS, *Deputy.*

(Endorsed:) No. 538 S. D.—Circuit Court of the United States, District of South Dakota, Southern Division—John C. McClellan et al. vs. George T. Blackman, Special Administrator of the Estate of John McClellan, Deceased—Order overruling and denying motion of State of South Dakota for leave to Intervene and staying prosecution for period of 90 days from Dec. 24, 1908.—Filed January 4, 1909, Oliver S. Pendar, Clerk. By Odin R. Davis, Deputy.

EXHIBIT "F."

In the *District Court* of the United States for the District of South Dakota, Southern Division.

17 JOHN C. MCCLELLAN, JAMES S. MCCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Plaintiffs,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Order Staying Proceedings.

On the affidavit of George J. Danforth, State's Attorney within and for the county of Minnehaha and State of South Dakota, and on all the files, pleadings and proceedings hereinbefore had, and on application of said Danforth as State's Attorney within and for the said County and S. W. Clark, Attorney General within and for state of South Dakota, and U. S. G. Cherry as special counsel for said State's Attorney and Attorney General,

It is hereby ordered that the further prosecution of the above entitled action by the said complainants be, and the same is hereby stayed until the determination of that certain action now pending in the Circuit Court within and for the county of Minnehaha in the State of South Dakota, wherein the state of South Dakota is complainant and Edward J. Taber and other persons therein designated by name *as* defendants, and all persons unknown having or claiming to have any right, title or interest in or to the estate of the said John

McClellan deceased, are also defendants, has been determined or until the further order of the court herein.

Done at Sioux Falls, S. D. this 18th day of March, 1909.

JOHN E. CARLAND, *Judge*.

Attest:

[SEAL.] OLIVER S. PENDAR, *Clerk*.

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EXHIBIT "G."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McClellan, Walter McClelland, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Order to Show Cause.

To the State of South Dakota and Attorney General thereof and the County of Minnehaha and State's Attorney thereof:

You will please take notice: that upon consideration of the annexed affidavit and petition of Melvin Grigsby, the court being duly advised in the premises and reason therefor appearing, it is hereby;

Ordered that you and each of you show cause before this court at the U. S. Postoffice building in the City of Sioux Falls, County of Minnehaha and State of South Dakota, on the 12th day of April, 1909, at ten o'clock A. M. of that day why the orders of this court staying proceedings herein, dated respectively January 4, 1909, and March 18, 1909, should not be vacated and set aside and why this suit should not proceed immediately to a speedy hearing and determination of the same, according to the statutes of the United States and rules of this court; that a copy of this order and the said affidavit and petition of said Melvin Grigsby be forthwith served upon George J. Danforth, state's attorney within and for said County and State.

Dated this 29th day of March, 1909.

By the Court:

JOHN E. CARLAND, *Judge*.

EXHIBIT "H."

In the Circuit Court of the United States for the District of South Dakota, Southern Division.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McClellan, Walter McClellan, and Edmund McClellan, Complainants,

vs.

GEORGE T. BLACKMAN, Special Administrator of the Estate of John McClellan, Deceased, Defendant.

Order.

The order to show cause, returnable on the 12th day of April, 1909, and adjourned by consent to the date hereof, why the order made by this court staying proceedings herein, dated respectively January 4th, 1909, and March 18th, 1909, should not be vacated and set aside, and why this suit should not proceed immediately to a speedy hearing and determination of the same, coming on regularly for hearing at the court room in the Federal Building in the city of Sioux Falls, in the said district, Grigsby & Grigsby appearing in support of the same and S. W. Clark, George J. Danforth and U. S. G. Cherry appearing in opposition thereto, and the court having heard the arguments of counsel and being fully advised in the premises and having fully considered the matter, it is hereby ordered:

That the application contained in the said Order to show cause be and the same hereby is in all things overruled and denied.

Dated at Sioux Falls, South Dakota this 14th day of April, 1909.

By the Court:

JOHN E. CARLAND, *Judge.*

Attest:

[SEAL.] OLIVER S. PENDAR, *Clerk.*

20 (Endorsed:) No. 99, Original. John C. McClellan, et al., Petitioners, vs. John E. Carland, United States District Judge for the District of South Dakota. Petition for Writ of Mandamus. Filed Apr. 22, 1909, John D. Jordan, Clerk.

(Judgment.)

And on the twenty-second day of April, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

No. 99, Orig.

JOHN C. McCLELLAN et al., Petitioners,

vs.

JOHN E. CARLAND, United States District Judge for the District of South Dakota.

On Petition for Writ of Mandamus.

THURSDAY, April 22, 1909.

This cause came on this day to be heard upon the original petition (or information) for a writ of mandamus, and was argued by Mr. Melvin Grigsby, of counsel for petitioners.

On Consideration Whereof, the Court being fully advised in the premises, it is now here ordered and adjudged that said petition for a writ of mandamus herein, be, and the same is hereby denied; and that the petition for such writ be, and the same is hereby, dismissed at the costs of the petitioners, except that no attorney's fee shall be taxed in favor of the respondent.

April 22, 1909.

21

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings in the case of John C. McClellan, et al., Petitioners, vs. John E. Carland, United States District Judge for the District of South Dakota, No. 99 Original, as full, true and complete as the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-seventh day of May, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

[Endorsed:] Supreme Court of the United States, October Term, A. D. 1909. John C. McClellan et al., Petitioners, vs. John E. Carland, United States District Judge for the District of South Dakota.

22 United States Circuit Court of Appeals, Eighth Circuit.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, WALTER McCLELLAN, and EDMUND McCLELLAN, Petitioners,
vs.

JOHN E. CARLAND, United States District Judge for the District of South Dakota.

Stipulation.

Whereas upon the application of the above named petitioners and upon a certified copy of the records and proceedings in this court herein a Writ of Certiorari was on the 16th day of November, 1909, issued by the Supreme Court of the United States of America directing and commanding this Court to send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done and;

Whereas a certified copy of all such records and proceedings is now on file in the said Supreme Court aforesaid and was filed therein at the time of the Petition for said Writ of Certiorari, now therefore;

It is hereby stipulated and agreed by and between the parties hereto that such certified transcript of record now on file in said Supreme Court of the United States of America shall be taken as a return to said Writ of Certiorari and that a certified copy of this stipulation be sent to said Supreme Court by the clerk of this court as his return to the said writ.

Dated at Sioux Falls, South Dakota, this 29th day of November, A. D., 1909.

GRIGSBY & GRIGSBY,

Attorneys and of Counsel for Above Named Petitioners.

JOHN E. CARLAND,

*United States District Judge for the
District of South Dakota.*

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 99 Orig. John C. McClellan, et al., Petitioners, vs. John E. Carland, U. S. District Judge, etc. Stipulation as to Return to Writ of Certiorari. Filed Dec. 1, 1909, John D. Jordan, Clerk.

23 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which John C. McClellan, James S. McClellan, William S. McClellan, Walter McClellan and Edmund McClellan, are petitioners, and John E. Carland, United States District Judge for the District of

South Dakota, is respondent, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

24 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixteenth day of November, in the year of our Lord one thousand nine hundred and nine.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

25 [Endorsed:] File No. 21,856. Supreme Court of the United States, No. 630, October Term, 1909. John C. McClellan et al., Petitioners, vs. John E. Carland, U. S. District Judge, etc. Writ of Certiorari. Filed Dec. 1, 1909. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of John C. McClellan, et al., Petitioners, v. John E. Carland, U. S. District Judge, etc., No. 99 Orig., is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this first day of December, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

26 [Endorsed:] File No. 21,856. Supreme Court U. S. October Term, 1909. Term No. 630. John C. McClellan et al., Petitioners, vs. John E. Carland, U. S. District Judge, etc. Writ of certiorari and return. Filed December 3, 1909.



FILED.

OCT 9 1909

JAMES H. McKENNEY,

CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WIL-
LIAM S. McCLELLAN ET AL., PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF SOUTH DAKOTA.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

GRIGSBY AND GRIGSBY,
Counsel for Petitioners.

MELVIN GRIGSBY,
Of Counsel.

(21,856.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN,
WILLIAM S. McCLELLAN, WALTER McCLELLAN,
AND EDMUND McCLELLAN, PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE FOR
THE DISTRICT OF SOUTH DAKOTA.

NOTICE OF APPLICATION TO THE SUPREME COURT.

*To the Honorable John E. Carland, United States District
Judge for the District of South Dakota and holding the
Circuit Court in said District:*

You are hereby notified, that the above-named petitioners will on Monday, the 11th day of October, 1909, upon their verified petition and a copy of the entire record in this matter, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the petition for writ of certiorari are hereby delivered to you) to the Supreme Court of the United States,

in its court room at the capitol, in the city of Washington, District of Columbia.

GRIGSBY & GRIGSBY,
Attorneys and Counselors for
Petitioners, Sioux Falls, S. D.

Copies of the foregoing notice of application, together with copies of notice of motion, petition for writ of certiorari, brief on application for writ of certiorari and copy of certified record were this day delivered to me by S. K. Grigsby, Esq., at Sioux Falls, South Dakota.

Dated this 27th day of September, A. D. 1909.

JOHN E. CARLAND, *Judge.*

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S.
McCLELLAN, WALTER McCLELLAN, AND EDMUND Mc-
CLELLAN, *Petitioners,*

vs.

JOHN E. CARLAND, *United States District Judge for the
District of South Dakota.*

Motion.

Comes now the petitioners, John C. McClellan, James S. McClellan, William S. McClellan, Walter McClellan, and Edmund McClellan, by Grigsby & Grigsby, attorneys and of counsel for said petitioners, and move this Honorable Court that it shall, by certiorari or proper process directed to the Honorable, the judges of the United States Circuit Court of Appeals for the Eighth Circuit, require said court to certify to this court, for its review and determination, a certain cause in said Court of Appeals lately pending, wherein John C. McClellan, James S. McClellan, William S. McClellan, Walter McClellan, and Edmund McClellan were petitioners, and John E. Carland, United States District Judge for the district of South Dakota was respondent, and to that end now tender herewith their petition, with a certified copy of the entire record in said matter in said Circuit Court of Appeals.

GRIGSBY & GRIGSBY,
Attorneys and Counselors for Petitioners,
Sioux Falls, South Dakota.

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WILLIAM S. McCLELLAN, WALTER McCLELLAN, AND EDMUND McCLELLAN, *Petitioners,*

vs.

JOHN E. CARLAND, *United States District Judge for the District of South Dakota.*

Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent that on the 8th day of September, 1908, they filed their bill in equity in the Circuit Court of the United States for the district of South Dakota, Southern Division, against one George T. Blackman, as special administrator of one John McClellan, deceased, in which bill of complaint is alleged:

First. The citizenship of your petitioners, to-wit: That John C. McClellan is a citizen and resident of Ellis County, in the State of Texas; that James S. McClellan is a citizen and resident of Pulaski County, in the State of Arkansas; that William S. McClellan is a citizen and resident of Teller County, in the State of Colorado; that Walter McClelland and Edmund McClellan are citizens and residents of Allegheny County, in the State of Pennsylvania.

Second. That John McClellan, whose true name was John McClelland, was a citizen and resident of the county of Minnehaha, and State of South Dakota, and that he died, intestate, on or about the 31st day of August, 1899, in the city of Sioux Falls, county of Minnehaha, State of South Dakota, and that said deceased left an estate in the afore-

said county and State consisting of real and personal property of the value at the time of his death of about the sum of thirty-three thousand dollars (\$33,000.00).

Third. That thereafter and on or about the 8th day of February, 1900, the county court in and for said county of Minnehaha, and State of South Dakota, after due and regular proceedings therein, made, filed and entered its order and issued letters of administration to one William Van Eps, of said county and State, as administrator of the said estate of said John McClellan, deceased. That said William Van Eps duly qualified as such administrator and did take possession of the said estate and held possession thereof until on or about the 12th day of July, 1906, when the said William Van Eps departed this life.

Fourth. That thereafter such proceedings were had in the said county court in the matter of the said estate, that on or about the 17th day of September, 1906, the said court made, filed, and entered its order and issued letters of special administration to George T. Blackman, a citizen and resident of the State of South Dakota, defendant above named, as special administrator of the said estate. That the said George T. Blackman did then and there qualify as such special administrator and did then and there take possession of the said estate and ever since has been and is now the duly appointed, qualified and acting special administrator of the said estate of said John McClellan, deceased.

Fifth. That the value of the said estate of John McClellan, deceased, situated and located within the State of South Dakota, and now in the possession and control of said George T. Blackman, as special administrator thereof, was on the first day of June, 1907, in excess of the sum of thirty-five thousand dollars (\$35,000.00); that the said estate at that time consisted of real estate situated in the city of Sioux Falls, county of Minnehaha, and State of South

Dakota, and farm lands in the county of Davison, State of South Dakota, cash in the hands of the said George T. Blackman, bank stock and certain miscellaneous notes and other personal property.

That since the said first day of June, 1907, the said George T. Blackman, as administrator, has rented, and collected, the rent from certain of the real estate and farming lands belonging to said estate and has deposited certain of the said cash in hand so as to obtain interest thereon for the benefit of said estate.

Sixth. That there are no outstanding claims against the said estate and that all the creditors of the said John McClellan, deceased, have been paid and that the said estate is now ready for distribution thereof according to the statutes of the State of South Dakota in such cases made and provided.

Seventh. That the said John McClellan, deceased, was born in the Parish of Skryne, in the County of Meath, Ireland, on or about the year A. D. Eighteen hundred and Twenty-one (1821), and that thereafter and on or about the 26th day of February, A. D. 1846, the said John McClellan, deceased, was duly and legally married to one Hannah Cruikshank in the Parish Church in said Parish of Skryne, County of Meath, Ireland.

Eighth. That three sons were born of said marriage, two of whom are petitioners John C. McClellan and James S. McClellan. That the third son, William S. McClellan, died on or about the year A. D. 1888, leaving three sons, who are your petitioners William S. McClellan, Walter McClellan and Edmund McClellan.

Ninth. That the petitioners, John C. McClellan and James S. McClellan are sons and the petitioners William S. McClellan, Walter McClellan, and Edmund McClellan are

grandsons of the said John McClellan, deceased, and that your petitioners are the sole surviving heirs-at-law and next of kin of the said deceased, John McClellan, and are lawfully entitled to inherit the estate of the said deceased under and by virtue of the laws and statutes of the said State of South Dakota.

Tenth. Your petitioners in said bill of complaint further alleged that they had no sufficient remedy at law and could only secure relief in a court of equity where such matters are cognizable and reviewable and to the end, that they might obtain the relief to which they were justly entitled and which they can obtain only in a court of equity, they prayed the court to grant them due process by subpoena directed to said George T. Blackman, as special administrator of the estate of John McClellan, deceased, commanding and requiring him to appear and answer, but not under oath, the several allegations in your petitioners' bill of complaint contained.

Eleventh. Your petitioners further in their said bill of complaint, prayed that upon the final hearing it be ordered and decreed that your petitioners John C. McClellan and James S. McClellan are sons and your petitioners William S. McClellan, Walter McClellan, and Edmund McClellan are grandsons of said John McClellan, deceased, and that your petitioners are the sole surviving heirs-at-law and next of kin of said deceased and entitled to inherit the said estate; and that the title in fee to all of the said real estate is in them, the said petitioners, and that it be further ordered and decreed that the said George T. Blackman, special administrator and defendant, render a just and true account of all the moneys and credits, bank stock, rents and interests collected and other personal property now in his hands belonging to the said estate and that, after deducting his lawful fees and expenses lawfully incurred as such ad-

ministrator, he distribute all of the personal property in his hands, as such special administrator, according to the laws of the State of South Dakota, in such cases made and provided, to-wit: To petitioners John C. McClellan and James S. McClellan one-third to each thereof, and to petitioners William S. McClellan, Walter McClellan and Edmund McClellan to each one-ninth thereof, and failing so to do that these petitioners may have judgment against him, the said George T. Blackman, as special administrator, for the total value of all of the said personal property found to be in his hands and under his control:

That pending a determination of their suit the said George T. Blackman, as special administrator aforesaid, be directed and required to hold intact the said estate, and both real and personal property thereof, and that he may be enjoined *pendente lite* from disposing or attempting to dispose of, or from distributing, and from assigning or turning over to any persons whatsoever, the said estate or any part thereof until further order of this court in the premises; and that the court grant such other and further relief herein as may be equitable and just.

That the said bill of complaint was signed and verified.

Your petitioners further respectfully represent that on the 25th day of September, 1908, the said George T. Blackman, defendant in the said suit in the said circuit court, duly made and filed his answer to the said bill of complaint, in which answer the said defendant:

First. Admitted the allegations contained in the first, second, third, and fourth paragraphs of the bill of complaint, which paragraphs of the complaint alleged the death of John McClellan, the value and location of the property left by the deceased, the appointment of himself as administrator and the possession by him of the property as special administrator; and,

Second. Alleged that as to every other allegation, statement and charge in said complaint contained defendant had no knowledge or information sufficient to form a belief and therefore denied the same; and,

Third. Represented to the court that he then held and until the order or judgment of the court to the contrary would continue to hold, the property described in the said bill of complaint to be disposed of agreeably to the judgment or order of the court and disclaimed any interest in or to said property or any part thereof save only in his official capacity as special administrator of the estate of the said John McClellan, deceased.

That on the 28th day of October these petitioners duly made and filed their replication to said answer.

These petitioners further respectfully represented that on the 24th day of November, 1908, the State of South Dakota made application to the said Circuit Court for leave to file a petition in intervention and obtained from said court an order requiring these petitioners and the defendant, George T. Blackman, to show cause before said court why leave should not be granted to the State of South Dakota to intervene as a party in said action or suit which had been begun as aforesaid by these petitioners; that the said order to show cause, omitting the title and formal parts thereof, is in words and figures as follows, to-wit:

"Order on Petition for Intervention.

"The petition of the State of South Dakota for leave to intervene herein, duly verified by S. W. Clark, Attorney General of the State of South Dakota, and by Alpha F. Orr, State's Attorney within and for the county of Minnehaha, in said State of South Dakota, having been presented to the court by U. S. G. Cherry, as special counsel for the said State

of South Dakota, and for the said Attorney General and said State's Attorney, and the same having been fully considered it is:

"Ordered that leave be and the same is hereby granted to file the said petition herein; that the 21st day of December, at the hour of ten o'clock of that day is hereby fixed as the time and the court room of the said court in the Federal Building at the city of Sioux Falls, in the said State, is fixed as the place for hearing upon the said petition; that a copy of said petition and this order be served upon the said petitioners or their said counsel, Grigsby & Grigsby, and upon the said defendant, or his said counsel, Aikens & Judge, at least fifteen (15) days before the date herein fixed for hearing, as aforesaid, and that the said petitioners and that the said defendant show cause, if any they have, before this court at the said time and place herein fixed for such hearing, or as soon thereafter as counsel can be heard, why leave should not be granted to the said State of South Dakota to intervene as a party to this action and why the said petitioners herein should not answer the said petition within such time as may be fixed by the order of the court upon such hearing, and that in case of the failure of the said petitioners so to do, then that the said petition be taken as confessed by the said petitioners and that a decree be entered herein accordingly, and that the said petitioners, at said time and place, further show cause, if any they have, why leave should not be granted to the said State of South Dakota to plead, demur, or reply to the said answer of the said petitioners herein, if such answer shall be made, and to take and have such other proceedings herein as may be granted, ordered and allowed and as may be just and equitable.

"Done at the city of Sioux Falls, in the said District of South Dakota, this 24th day of November, 1909.

"By the court:

"JOHN E. CARLAND, *Judge.*"

That a return to said order to show cause was duly filed on behalf of these petitioners, and the matter of the said order to show cause came on for hearing before said court on the 21st day of December, 1908, and the court having heard arguments for and against the granting of said petition, and having taken the said matter under advisement, on the 4th day of January, 1909, made and entered an order overruling the motion of the said State of South Dakota for leave to intervene, which order overruling said motion is, omitting the formal parts thereof, in words and figures as follows, to-wit:

"The above-entitled cause coming on for hearing before the court, pursuant to the petition filed herein by leave of this court by the State of South Dakota for leave to intervene herein and upon the order to show cause based upon the said petition, returnable herein on the 21st day of December, 1908, S. W. Clark, Attorney General within and for the State of South Dakota, Alpha F. Orr, State's Attorney within and for the county of Minnehaha, and U. S. G. Cherry, as special counsel for the said State of South Dakota, all appearing in behalf of the said State of South Dakota, and Grigsby & Grigsby, solicitors for the petitioners, appearing in opposition to the said petition and order to show cause, and the court having heard the arguments of counsel and being fully advised in the premises, now, on all the proceedings hereinbefore had, it is

"Ordered, that the motion of the said State of South Dakota for leave of intervention herein be and the same is overruled and denied; and it is

"Further ordered, that the further prosecution of this action be and the same is hereby stayed for a period of ninety days from and after December 24, 1908, for the purpose of allowing the State of South Dakota to commence a proper action or proceeding in the proper court to establish its alleged title and interest in and to the said property and estate of the said decedent, and that in the event that such action is com-

menced within this time, then that this action and the prosecution thereof be further stayed until the determination of such action brought by the State of South Dakota, and that in case no such action is commenced by the State of South Dakota within the time herein specified, then that this action shall proceed as equity and justice may require.

"Done at SiouxFalls, South Dakota, this 4th day of January, 1909.

"By the court:

"JOHN E. CARLAND, *Judge.*"

That the written opinion of Judge Carland filed for record in connection with the order overruling the motion for leave to intervene, omitting the title thereof, is as follows:

"On motion for leave to intervene by the State of South Dakota.

"U. S. G. Cherry, Special Counsel.

"S. W. Clark, Attorney General, and Alpha F. Orr, State's Attorney for Minnehaha County, South Dakota, for the State.

"Grigsby & Grigsby, Solicitors for Complainants, in Opposition to motion.

"CARLAND, *District Judge:*

"The motion for leave to intervene has been submitted upon the petition filed in behalf of the State and the return to the order to show cause issued upon the filing of said petition. This action is one in equity brought by complainants to recover certain property now in the possession of the defendant. The sworn petition filed on behalf of the State sets forth that the property in question is the property of the State by reason of the fact that one John McClellan, the former owner thereof, died intestate without heirs. If it were possible for the State in this action to establish the fact

that said property had so devolved to the State the leave to intervene would be granted. It would, however, be an idle proceeding to permit the State to intervene when it appears if it did intervene it could not in this action establish its title by escheat. The petition on file does not show any adjudication of any court vesting the title to said property in the State. No such adjudication can be made until some action is brought by the State to which all the world may be said to be parties and the claim of the State that John McClellan died intestate without heirs established therein.

"It is not necessary to determine the question on this motion as to whether under the laws of South Dakota title vests immediately in the State upon the death of intestate without heirs, or whether an action in the court is necessary to so vest it, as in either event when the State seeks to assert its title it must present some legal evidence of it. Whether the complainants may maintain their action cannot be considered on this motion. This is a proceeding in equity, however, and the court must act accordingly in view of the facts disclosed by the petition. The order will be that the motion to intervene be denied and the prosecution of this action be stayed for the period of ninety days to allow the State to commence a proper action to establish its title. In the event that such action is commenced within such period, this action will be further stayed until the determination of said action brought by the State. If no such action is commenced as herein specified, then this action shall proceed as equity and justice may require.

"(Endorsed:) No. 538. S. D. United States Circuit Court, District of South Dakota. John C. McClellan *et al.*, complainants, *vs.* George T. Blackman, defendant. Memorandum. Filed Dec. 24, 1908. Oliver S. Pendar, clerk, by Odin R. Davis, deputy."

That upon the 18th day of March, 1909, the said Circuit Court, in pursuance of the order heretofore set out, which

order overruled the motion for intervention and stayed further proceedings, and upon a showing made by affidavit that the State had begun an action to escheat, made a further order staying proceedings of the said suit brought in said Circuit Court by these petitioners, which further order, omitting the title, is in words and figures as follows, to-wit:

"On the affidavit of George J. Danforth, State's Attorney within and for the county of Minnehaha and State of South Dakota, and on all the files, pleadings and proceedings hereinbefore had, and on application of said Danforth as State's Attorney within and for the said county and S. W. Clark, Attorney General within and for said State of South Dakota, and U. S. G. Cherry, as special counsel for said State's Attorney and Attorney General,

"It is hereby ordered, that the further prosecution of the above-entitled action by the said complainants be and the same is hereby stayed until the determination of that certain action now pending in the Circuit Court within and for the county of Minnehaha in the State of South Dakota, wherein the State of South Dakota is complainant and Edward J. Taber and other persons therein designated by name are defendants, and all persons unknown having or claiming to have any right, title or interest in or to the estate of the said John McClellan, deceased, are also defendants, has been determined or until the further order of the court herein.

"Done at Sioux Falls, South Dakota, this 18th day of March, 1909.

"JOHN E. CARLAND, *Judge.*"

That thereafter and on the 29th day of March, 1909, these petitioners made application to the said Circuit Court and procured an order upon the State of South Dakota and the Attorney General thereof to show cause before the said Circuit Court why the said orders staying proceedings should not be set aside and vacated and why the suit of these petitioners should not proceed immediately to a speedy hearing

and determination of the same, which order so obtained, omitting the title, is as follows, to-wit:

"To the State of South Dakota and Attorney General thereof and the County of Minnehaha and State's Attorney thereof:

"You will please take notice: that upon consideration of the annexed affidavit and petition of Melvin Grigsby, the court being duly advised in the premises and reason therefor appearing, it is hereby

"Ordered, that you and each of you show cause before this court, at the United States Postoffice Building, in the city of Sioux Falls, county of Minnehaha and State of South Dakota, on the 12th day of April, 1909, at ten o'clock a. m. of that day, why the orders of this court staying proceedings herein, dated respectively January 4, 1909, and March 18, 1909, should not be vacated and set aside and why this suit should not proceed immediately to a speedy hearing and determination of the same, according to the statutes of the United States and rules of this court; that a copy of this order and the said affidavit and petition of said Melvin Grigsby be forthwith served upon George J. Danforth, State's Attorney within and for said county and State.

"Dated this 29th day of March, 1909.

"By the court:

"JOHN E. CARLAND, *Judge.*"

That return to the said order to show cause was duly made by the Attorney General and the matter coming on for hearing before the said Circuit Court on the 14th day of April, 1909, and having been duly considered the court entered an order overruling the application contained in the said order to show cause, which order so overruling the said application, omitting the title, is as follows, to-wit:

"The order to show cause, returnable on the 12th day of April, 1909, and adjourned by consent to the date hereof,

why the order made by this court staying proceedings herein, dated respectively January 4, 1909, and March 18, 1909, should not be vacated and set aside, and why this suit should not proceed immediately to a speedy hearing and determination of the same, coming on regularly for hearing at the court room in the Federal Building in the city of Sioux Falls, in the said district, Grigsby & Grigsby appearing in support of the same and S. W. Clark, George J. Danforth, and U. S. G. Cherry appearing in opposition thereto, and the court having heard the arguments of counsel and being fully advised in the premises and having considered the matter, it is hereby ordered:

"That the application contained in the said order to show cause be, and the same hereby is, in all things overruled and denied.

"Dated at Sioux Falls, South Dakota, this 14th day of April, 1909.

"By the court:

"JOHN E. CARLAND, *Judge.*"

That thereafter and on the 22d day of April, 1909, your petitioners applied to the United States Circuit Court of Appeals for the Eighth Circuit for a writ of mandamus commanding Judge John E. Carland to vacate his said order staying proceedings in the Circuit Court for his district, and in their petition to the said Circuit Court of Appeals your petitioners, after setting out all of the proceedings had before Judge Carland in the Circuit Court substantially as hereinbefore stated, concluded as follows:

"Your petitioners further allege that the said orders staying proceedings, Exhibit "E" and Exhibit "F," have never been vacated or set aside; that the said order, Exhibit "H," refusing to vacate and set aside the said orders staying proceedings has never been vacated or set aside. That said orders were made by the said Circuit Court arbitrarily and unlawfully and in violation of the right which your peti-

tioners have under the Constitution and laws of the United States to have their said action in the Circuit Court tried by the said court in the ordinary course of procedure, and that your petitioners have no remedy by appeal or writ of error to review the said orders.

"Wherefore your petitioners pray that this court issue to the Honorable John E. Carland, District Judge of the United States for the District of South Dakota and holding the Circuit Court in said district, a writ of mandamus, commanding him to vacate and set aside said orders staying proceedings in said action and to proceed to try and determine said action in the usual course of procedure without regard to the pendency of the proceeding, hereinbefore alleged, now pending in the courts of the State of South Dakota."

That the said petition for writ of mandamus was heard by the United States Circuit Court of Appeals and denied, and that the order denying said application and dismissing the petition for writ of mandamus is shown by the following certified copy of the record thereof in said court:

"UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT, DECEMBER TERM, 1908.

"No. 99, Original.

"THURSDAY, April 22, 1909.

"JOHN C. McCLELLAN ET AL., *Petitioners,*

vs.

"JOHN E. CARLAND, *United States District Judge for the
District of South Dakota.*

"On Petition for Writ of Mandamus.

"This cause came on this day to be heard upon the original petition (or information) for a writ of mandamus, and was argued by Mr. Melvin Grigsby, of counsel for petitioners.

"On consideration whereof, the court being fully advised in the premises, it is now here ordered and adjudged that said petition for a writ of mandamus herein be, and the same is hereby, denied; and that the petition for such writ be, and the same is hereby, dismissed at the costs of the petitioners, except that no attorney's fee shall be taxed in favor of the respondent.

"April 22, 1909.

"UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT.

"I John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the judgment dismissing the petition for writ of mandamus in the case of John C. McClellan *et al.*, Petitioners, *vs.* John E. Carland, United States District Judge for the District of South Dakota, No. 99, Original, as full, true and complete as same remains on file and of record in my office.

"In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office, in the city of St. Louis, Missouri, this 10th day of May, A. D. 1909.

"[SEAL.]

JOHN D. JORDAN,
"Clerk of the United States
Circuit Court of Appeals."

Your petitioners have no right of appeal or writ of error herein to this Honorable Court, because the jurisdiction of the Circuit Court depended entirely on diverse citizenship.

The order staying proceedings in the Circuit Court and the order of the Circuit Court of Appeals refusing the relief there prayed for are in effect final orders or decisions.

If these petitioners are compelled to await the final decision of the State court, which involves the same subject-

matter of the suit of your petitioners in the Circuit Court of the United States, they are virtually denied their rights under the Constitution to have their cause determined in the United States Circuit Court, because if the final decision of the action in the State court in which your petitioners have been made defendants should be adverse to them, the judgment therein would be a bar to further proceedings in their suit in the United States Circuit Court; if the final decision in the State court should be in their favor there would then be no necessity for further proceedings in the United States Circuit Court.

While this cause may not be considered of great importance from the standpoint of the amount involved, which is in excess of thirty-five thousand dollars (\$35,000.00), the principle involved is of the gravest importance, because the contention of your petitioners is that they have been deprived of rights guaranteed to them by section two (2) of article three (3) of the Constitution of the United States.

Your petitioners present herewith as part of this petition a brief showing more fully their views upon the questions involved, and also a transcript of the record in the Circuit Court of Appeals.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled John C. McClellan *et al.*, Petitioners, *vs.* John E. Carland, United States District Judge for the District of South Dakota, No. 99, Original, to the end that the said case may be reviewed and determined by this court as provided in section six (6) of the act of Congress entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts

of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray.

JOHN C. McCLELLAN,
 JAMES S. McCLELLAN,
 WILLIAM S. McCLELLAN,
 WALTER McCLELLAN,
 EDMUND McCLELLAN,
Petitioners,

By GRIGSBY & GRIGSBY,
Their Counsel.

MELVIN GRIGSBY,
Of Counsel.

STATE OF SOUTH DAKOTA,

County of Minnehaha, ss:

Melvin Grigsby, being duly sworn, says that he is one of the counsel for the petitioners above named; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

MELVIN GRIGSBY.

Subscribed and sworn to before me this 27th day of September, 1909.

[SEAL.]

GEO. T. BLACKMAN,
Notary Public, South Dakota.

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one and is such that the prayer of the petition should be granted by this Honorable Court.

MELVIN GRIGSBY.

[Endorsed:] Supreme Court of the United States, October term, A. D. 1909. John C. McClellan *et al.*, petitioners, *vs.* John E. Carland, United States District Judge for the District of South Dakota.



FILED.
OCT 13 1909
JAMES M. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

JOHN C. McCLELLAN, JAMES S. McCLELLAN, WIL-
LIAM S. McCLELLAN, ET AL., PETITIONERS,

vs.

JOHN E. CARLAND, UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF SOUTH DAKOTA.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

GRIGSBY AND GRIGSBY,
Counsel for Petitioners.

MELVIN GRIGSBY,
Of Counsel.

(21,856.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 630.

IN RE JOHN C. McCLELLAN ET AL.

vs.

GEORGE T. BLACKMAN.

BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

These petitioners in presenting their application to the United States Circuit Court of Appeals for a writ of mandamus relied mainly upon the case of Barber Asphalt Paving Company against Judge Morris, decided by the same court in 1904.

132 Fed., 945.

In that case the complainants, as in this, brought suit in the United States Circuit Court claiming jurisdiction of the court on the grounds of diversity of citizenship.

In the case of the Asphalt Paving Company against Morris the circuit court granted a stay of proceedings on the grounds that actions were pending in the State court involving the same subject-matter as that of the case brought in the circuit court.

It was not claimed in that case and is not claimed in this that the circuit court did not have jurisdiction of the suit.

The only difference between that case and the one at bar is that in that case the court granted a stay of proceedings because there were other actions pending in the State courts involving the same subject-matter, and the stay was granted to await the determination of those actions, while in this case the stay of proceedings was granted to allow the State of South Dakota 90 days within which to begin an action in a proper court to establish its title to the property in question, and if such action was brought within that time then the suit in the circuit court was to be stayed to await the result of such action.

We have not been able to find precedent for the ruling of the circuit court in this case. We take it, however, that there can be no difference in principle between staying proceedings to await the result of actions already begun and staying proceedings to permit an action to be begun, and that if authority could be found sustaining one of these positions it would also sustain the other.

In the opinion in *Barber Asphalt Paving Company against Morris*, delivered by the learned Judge Sanborn, it was said:

"It is, however, earnestly argued that the order of the court below constituted neither a bar nor an abatement of the action before it, but that it was a mere discretionary order staying proceedings for a definite time, and hence not subject to challenge upon an application for a writ of mandamus. The answer is that it stayed proceedings until they would in all probability be futile, until the petitioner would probably be estopped by the final judgments of other courts from any hearing or trial of its controversy upon the merits in the courts of the nation."

Insurance Co. vs. Harris, 97 U. S., 331, 336, 338; 24 L. Ed., 959.

"The reason for the rule that the pendency of an action in a State court is no bar and furnishes no ground for the abatement of another action for the same cause between citi-

zens of different States in the Federal court is that the latter court has concurrent jurisdiction of such controversies with the courts of the State, and that citizens of different States have the constitutional right to the independent opinion and judgment of the judges of the national courts upon the questions presented by their controversies at least until those questions have become *res adjudicata* by the judgments of other competent courts. Orders that such citizens shall secure no such opinions until they are conclusively estopped from obtaining them by the final judgments of other courts upon their controversies as effectually deprive them of their rights to adjudications in the national courts as judgments sustaining pleas in bar or in abatement. Nay, they deprive them of those rights more effectually, because such judgments are reviewable by appeal or by writ of error, while such stays may not be so challenged. The power is granted to the judges of the circuit court and the duty is imposed upon them by the Constitution and the acts of Congress to form and express their independent opinions upon controversies between citizens of different States over which the jurisdiction of their courts is properly invoked. However grateful to them and courteous to others it would be in cases of concurrent jurisdiction to await the opinions of the respected and able jurists who adorn the benches of the courts of the States, and then to be bound by their decisions, that power may not be lawfully abdicated, nor may that duty be legally renounced, by the judges of the Federal courts. The order staying proceedings in the action in the circuit court until the final determination of the appeals in the State courts is violative of these principles, calculated to deprive the petitioner of its right to the independent decision of the Federal court upon the question involved in its controversy, and it cannot be sustained."

The same reasoning will apply in this case, unless there is a difference between the two cases arising out of the fact that in one case the opposing party in the State court was one of the cities of the State, while in the other the State itself was claiming an interest in the subject-matter of the suit.

The Circuit Court of Appeals in denying the writ of mandamus in this case did not render an opinion in writing,

but orally stated, to the best recollection of the attorneys for your petitioners, that the rule established by the decision in Barber Asphalt Paving Company did not apply, because in the matter presented to them it appeared that in the suit of your petitioners against George T. Blackman, as administrator, the State of South Dakota had formally appeared and claimed title to the property in question, and that therefore the circuit court could not proceed without making the State a party, and that to make the State a party would oust the jurisdiction of the court under the Eleventh Amendment to the Constitution of the United States.

The court also stated that they were controlled by the decisions in—

State of Minnesota *vs.* The Northern Securities Co.,
184 U. S., 200, and
California *vs.* Southern Pacific Company, 157 U. S.,
229,

and referred particularly to the following portion of the opinion of Judge Shiras in the Northern Securities case:

“The established practice of courts of equity to dismiss the plaintiff’s bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel.

“Shields *vs.* Barrow, 17 How., 130; 15 L. Ed., 158.

“Hipp *vs.* Babin, 19 How., 271-278; 15 L. Ed., 633-635.

“Parker *vs.* Winnipiseogee Lake Cotton & Woolen Co., 2 Black., 545; 17 L. Ed., 333.”

In both the Securities Company case and that of the Southern Pacific Company this court held that the complaints disclosed that the relief could not be granted as prayed for without affecting the rights of others not parties to the suits.

In the case at bar there is nothing in the bill of complaint of your petitioners in the circuit court from which it can be gathered that the State or any party, except only the petitioners and the defendant, had any interest whatever in the subject-matter of the suit, unless it can be claimed that in every case wherein heirs seek to establish title to the property of a decedent the State is a necessary party, or can claim the right of intervention on the ground that the property of all decedents escheats to the State in default of legitimate heirs.

The State of South Dakota petitioned the circuit court for leave to intervene, claiming to be the owner of the property in question, because the same had escheated to the State, making a case almost exactly in line with—

United States *vs.* Judge Peters, 5th Cranch, 115,

wherein Chief Justice Marshall, writing the opinion, said:

“It is contended that the Federal courts were deprived of jurisdiction, in this cause, by that amendment of the Constitution which exempts States from being sued in those courts by individuals. This amendment declares, ‘that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

“The right of the State to assert, as plaintiff, any interest it may have in a subject, which forms the matter in controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a State. The State cannot be a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant. In this case, the suit was not instituted against the State or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds

had been the actual property of Pennsylvania, however, wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a State of property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title."

The State of South Carolina *vs.* Edward B. Wesley, 155 U. S., 543; 39 L. Ed., 254, is almost identical in principle with the case here presented.

In that case the action was brought by a citizen of the State of New York *vs.* citizens of the State of South Carolina to recover possession of certain real estate. The defendant denied the allegations of the complaint, and as a second defense claimed that he was in possession of the property as the secretary of state of the State of South Carolina, disclaiming any individual right, title, or interest in the property. Before the trial came off the Attorney General appeared on behalf of the State and suggested to the court and gave it to understand and be informed that the property in controversy was in the possession of and belonged to the State, and insisted that on that account the court had not jurisdiction of the subject in controversy, and moved that the complaint be set aside and all proceedings dismissed.

The circuit court overruled the motion to dismiss, and a writ of error having been allowed, this court sustained the ruling of the lower court and cited:

United States *vs.* Peters, 9 U. S., Cranch, 115 (3:53).

The Exchange *vs.* McFadden, 11 U. S., 7 Cranch, 116 (3:287).

Osborn *vs.* Bank of United States, 22 U. S., 9 Wheat., 738 (6:204).

United States *vs.* Lee, 106 U. S., 196 (27:171).

Stanley *vs.* Schwalby, 147 U. S., 508 (37:259).

Again in—

Tindal *vs.* Wesley, 167 U. S., 203-206; 42 L. C. P., 137,

which seems to be the leading case on this subject, and a branch of the case last above cited, this court again reviewed many prior decisions, referring to the case of *United States vs. Lee* as the leading case on the subject, and in the opinion said:

"We now repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this court in *United States vs. Peters*:

" 'It certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the subject and examining the validity of the title.' "

The fundamental error in the reasoning of the Circuit Court of Appeals seems to have been in holding that a decision in favor of the plaintiffs in the court below would be binding upon the State of South Dakota.

That such would not have been the case has been repeatedly decided by this court. For instance, in—

Tindal vs. Wesley,

supra, in the opinion written by Judge Harlan, it was said:

"It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its right to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim."

The same doctrine was laid down in—

United States *vs.* Lee, 16 Otto, 196-251; 27 L. C. P., 171, and in—

Carr *vs.* United States, 98 U. S., 433; 25 L. C. P., 209.

In the last above cited case the point was directly raised as to whether a judgment against a defendant who claimed title under the United States could be set up by way of estoppel in an action brought by the United States to quiet title to the same land.

It was held that such judgment was no estoppel, even though in the former action the United States district attorney for the district, and other counsel employed by the Secretary of the Treasury, attended at the trial on behalf of the defendant.

It would seem that if the ruling of the honorable judge of the circuit court in staying proceedings and the decisions of the learned judges of the Circuit Court of Appeals in refusing the writ of mandamus were correct, it would follow that article 3 of section 2 of the Constitution of the United States, which provides that "the judicial power shall extend to all cases * * * between citizens of different States," should be followed by a proviso stating that if in any action brought by citizens of one State against citizens of another States to determine property rights a State should come into court and claim to be the owner of the property involved in the action, then in such event such action should be dismissed.

"As to Jurisdiction of the Circuit Court."

That the circuit court had jurisdiction of the suit of John McClellan *et al.* *vs.* George T. Blackman, as administrator,

seems to have been settled beyond all controversy by this court in—

Payne *vs.* Hook, 7 Wall., 425; 19 L. Ed., 260.

Byers *vs.* McAuley, 149 U. S., 608; 37 L. Ed., 867,
and cases cited in the later case of—

Ingersoll *vs.* Coram, Advance Sheets U. S. Supreme Court, January 15th, 1909.

Respectfully submitted,

GRIGSBY & GRIGSBY,

Counsel for Petitioners.

MELVIN GRIGSBY,

Of Counsel.

[Endorsed:] Supreme Court of the United States, October term, A. D. 1909. John C. McClellan *et al.*, petitioners, *vs.* John E. Carland, United States district judge for the district of South Dakota.